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No. 93-1436

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

STANLEY HENRY, individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

Petitioner,

against

JAMES W. WETZLER, as COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Brief in Opposition to Petition for Writ of Certiorari

Respondent respectfully requests this Court to deny the petition for a writ of certiorari seeking to review the opinion of the New York Court of Appeals. The judgment of the Court of Appeals was in all respects proper, and the Court of

Appeals' opinion does not conflict with any decisions of this Court or with any other state courts of last resort.

Counterstatement of the Case

Petitioner Chanry Communications is in the business of publishing shopping papers. Petitioner Stanley Henry was, during the period in issue, an officer and/or employee of Chanry (A33, A38).[1]

After an audit for the period October 1, 1982 through February 28, 1985 the Division of Taxation issued assessments of sales and use tax due of $246,719.59[2] plus penalties and interest against both Chanry Communications and Mr. Henry. Petitioner[3] challenged the assessment and waived a hearing (A33). Petitioner and the Audit Division entered into a joint stipulation of facts (NYA9-13)[4], which was ultimately adopted by both the administrative law judge and the New York Tax Appeals Tribunal (A17, A32).

The Joint Stipulation

The parties stipulated that Chanry runs, publishes and distributes seventeen separate free-circulation shopping papers throughout Long Island. They are circulated to the public free of charge in specifically designated geographic areas (NYA9). Chanry's business is described in the stipula-

[1]The numbers in parentheses preceded by "A" refer to pages in the Appendices reproduced at the end of the petitioner's Petition for a Writ of Certiorari. Throughout this brief the terms shopping paper and pennysaver will be used interchangeably.

[2]This amount reflects tax on some items not contested here.

[3]The petitioner is Mr. Henry individually and on behalf of Chanry.

[4]NYA refers to pages in the Appendix to petitioner's New York Court of Appeals brief.

tion as "soliciting and receiving advertisements from various advertisers" (NYA9). The advertisers choose the type of advertisement placed in the shopping paper, its style and location in the format of the shopping paper and they choose which pennysavers the ads are to be published in, based on the distribution of each. Chanry's advertising rates depend on which pennysavers publish the ads (NYA9-10). The fees obtained by Chanry from advertisers are for the advertising and delivery of the pennysavers to the public (NYA11). The distribution of the shopping papers to the public is not subject to sales tax (NYA10).

Besides the advertisements, Chanry's pennysavers include news and feature stories, reader polls, editorials, photographs and reader correspondence (NYA11). Chanry retains complete editorial control over the news and features (NYA10).

Before the Division of Tax Appeals petitioner made a statutory argument that Chanry's purchases were not subject to tax generally imposed on retail sales because they met the requirements of the production exemption contained in Tax Law § 1115(a)(12) and (c).[5] That exemption applies to machinery, equipment and electricity used to produce tangible personal property for sale. Petitioner argued that the distri-

[5]Tax Law § 1115 provides as follows:

Exemptions from sales and use taxes

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten: * * * (12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, * * * for sale, by manufacturing, processing, generating, * * * (c)

(Footnote continued on next page.)

bution of the pennysavers to the public for free was really a sale of tangible personal property because the advertisers paid consideration to Chanry who then transferred the shopping papers to the public as the advertisers' designee (NYA12-13). Respondent argued that publishing pennysavers for free distribution is not the manufacture of tangible personal property for sale within the meaning of Tax Law § 1115(a)(12) (NYA13).

The Administrative Determination

The Administrative Law Judge and then the New York Tax Appeals Tribunal sustained the tax assessed, concluding that the production exemption did not apply to the production of shopping papers. In so doing, they held that the shopping papers were not produced *for sale* as Tax Law § 1115(a)(12) and (c) require (A23-30; A38-51), and that the shopping papers are not "newspapers" and, therefore, do not qualify for the exemptions granted to newspapers (A28, A45-47). Instead, they found that Chanry provided an advertising service and produced the shopping papers in connection with that service (A29; A41).

Before the Tribunal, the petitioner apparently claimed that the failure to give Chanry the same tax treatment as newspapers violated their rights under the Equal Protection clauses of the state and federal Constitutions. The Tribunal

(Footnote continued.)

* * * electricity * * * for use or consumption directly and exclusively in the production of tangible personal property, * * * for sale, by manufacturing, processing, assembling, generating, * * * shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

held that it had no jurisdiction to decide a facial attack on the constitutionality of a statute, but said that as far as the statute was written, it was applied properly and constitutionally to Chanry and petitioner (A47-48).

In its decision, the Tribunal pointed out that Chanry's business transactions could have been structured to take advantage of other statutory exemptions. It could have been arranged so that another publisher printed the papers and sold them to Chanry. Then Chanry would have had no responsibility for sales tax since its purchase of the papers would have been exempt under Tax Law § 1115(i)(A). The printers' purchase of machinery and equipment used to produce the shopping papers would have been exempt as the production of tangible personal property for sale (to Chanry). The form of transaction chosen by the petitioner was, however, what controlled (A48).

Accordingly, the notices of determination were sustained and the administrative petition denied (A50). The petitioner then challenged the Tribunal's decision in a proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Appellate Division Decision

In a unanimous opinion, the Appellate Division held that petitioner's purchases did not qualify for the exemption because they were not used to produce tangible personal property for sale. Without discussion, the court summarily rejected the petitioner's remaining arguments (which included the claim that the interpretation of the statute so as to exempt paid circulation newspapers, while not exempting

free circulation newspapers, was a violation of his first amendment right to freedom of the press and his rights under the Equal Protection Clause of the United States Constitution) (A13-14).

The Decision of the New York Court of Appeals

In a memorandum decision the Court of Appeals affirmed the judgment of the Appellate Division (A3 et seq.). After first addressing the statutory argument, the court rejected petitioner's claim that differential treatment for pennysavers violated its first amendment rights. It found that the statute at issue was part of a "set of 'generally applicable economic regulations' designed to ensure that the incidence of the tax fal]s only on the last transaction in the production chain", citing *Minneapolis Star & Tribune v Minnesota Commr. of Revenue*, 460 US 575, 581 (1983). The New York statute was contrasted with those struck down by this Court in *Minneapolis Star & Tribune v Minnesota Commr. of Revenue*, *supra*, and *Arkansas Writers' Project, Inc. v Ragland*, 481 US 221 (1987), where the invalidated statutes were directed at the press in general or at a particular class of news entities. The court noted that the New York tax scheme denies the exemption to *any* business that does not produce a product for sale (A5).

REASONS FOR DENYING THE WRIT

The New York Court of Appeals opinion in no way conflicts with settled law or any decisions of this Court or any other state court of last resort.[6]

Preliminarily, petitioner is challenging the interpretation given to the tax provision that grants an exemption from sales tax for purchases of items made that are used in the production of tangible personal property for sale. He is not challenging the statute itself, which is similar to those in most states throughout the country. He is attacking the interpretation given the word "sale" in that statute. Therefore, strictly speaking, he is incorrect in invoking the jurisdiction of this Court under § 1257-a on the asserted ground that *a statute* is drawn into question in that it is repugnant to the Constitution.

In any event, contrary to petitioner's assertions, this is not a case of first impression. It is abundantly clear from this Court's decisions in *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue*, 460 US 575 (1983), *Arkansas Writers' Project, Inc. v Ragland*, 481 US 221 (1987), and *Leathers v Medlock*, 499 US 439 (1991) that the First Amendment is not implicated in this situation. And contrary to petitioner's assertions, these precedents consistently adhere to the same principles and are not in need of further clarification.

In *Minneapolis Star*, this Court said that there was nothing unconstitutional in subjecting the press to a gener-

[6]Petitioner cites cases from other states in an attempt to argue that this Court's precedents are in need of clarification, but none of them conflicts with the ruling of the New York Court of Appeals.

ally applicable tax. 406 US at 575 and at 589 n 12. The tax was invalidated there because it was created expressly for the press and because the tax targeted only a small group of newspapers which bore the entire tax burden. The tax in *Arkansas Writers' Project* was struck because only some magazines were subject to tax while other magazines were not and because the distinctions drawn in the Arkansas statute were based on subject matter. Religious, professional, trade and sports journals were exempted while general interest magazines were not. In *Leathers v Medlock*, this Court held that the First Amendment does not prevent a State from imposing its sales tax in a generally applicable taxing statute on selected segments of the media while not on others. In that case all cable television services were not exempted from the tax although newspaper and subscription magazine sales were.

The prohibition in all three cases is against singling out the press for special and more burdensome treatment because of the burdens it places on the freedom of the press protected by the First Amendment.[7] In *Leathers*, this Court drew upon its prior holdings in *Grosjean v American Press Co.*, 297 US 233 (1936), *Minneapolis Star*, *supra*, and *Arkansas Writers' Project*, *supra*, to cull the rule that a statute is constitutionally suspect "when it threatens to suppress the expression of particular ideas or viewpoints * * *

[7]Petitioner is confused when he equates the notion of targeting the press with a censorial motive in doing so, and argues that this Court has left unclear, after its *Leathers* decision, whether a State must have a censorial motive before a statute will be invalidated on First Amendment grounds. (Pet pp 23-24). Targeting the press in a tax statute is not the same as doing so with the intent to censor. This Court has never wavered from the principle that a statute may not single out the press even if the motive for doing so is other than to suppress ideas.

[when it] targets a small group of speakers * * * [or] if it discriminates on the basis of the content of taxpayer speech." *Leathers v Medlock*, *supra*, 499 US at 447. The fear behind all these factors is a suppression of particular ideas. The *Leathers* Court also noted that "a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction" (499 US at 450), and that legislatures have "especially broad latitude in creating classifications and distinctions in tax statutes." 499 US at 451, citing *Regan v Taxation With Representation of Washington*, 461 US 540, 547 (1983). Thus, no paper has a right under the First Amendment to an exemption for purchases of machinery and equipment. As will be explained below, the fact that in New York some newspapers can claim one is a function of a generally applicable taxing structure in which the granting of this exemption turns on the fact that they are sold to the public.

The Treatment of Petitioner's Papers Is a Result of the Application of a Generally Applicable Tax Scheme

The tax does not target the press or any segment of the press. The sales tax provisions provide a generic exemption to all industries for purchases of machinery and equipment used predominantly in the production of tangible personal property *for sale*. Neither newspapers nor publications of any kind are mentioned in Tax Law § 1115(a)(12) and (c), which applies to producers of tangible personal property generally. The key to an exemption then is whether the personal property is produced for sale. In this general scheme the Legislature was avoiding a pyramiding of tax throughout the production process and determined that the customer should pay the tax at the end of the production chain. That way, the tax would only be paid once. *See*,

Shanty Hollow Corporation v New York State Tax Commission, 111 AD2d 968, 490 NYS2d 67 (3d Dept), *lv den*, 66 NY2d 603, 489 NE2d 256 (1985); *Imperial Manufacturing Company v State Tax Commission*, 99 AD2d 874, 472 NYS2d 753 (3d Dept), *lv den*, 63 NY2d 604, 469 NE2d 531 (1984), citing *Burger King v State Tax Commission*, 70 AD2d 447, 421 NYS2d 668 (3d Dept 1979), *mod on other grounds*, 51 NY2d 614, 416 NE2d 1024, 435 NYS2d 689 (1980); *Niagara Mohawk Power Corp. v Wanamaker*, 286 App Div 446, 448, 144 NYS2d 458 (4th Dept 1955), *affd*, 2 NY2d 764, 139 NE2d 150, 157 NYS2d 972 (1956). This means that newspapers that are sold can claim an exemption from sales tax on their purchases of machinery and equipment and newspapers that are not cannot. The law does not distinguish between what we commonly refer to as newspapers and advertising papers like the pennysaver involved here. If petitioner's pennysavers were sold to the public, he would be exempt from the sales tax imposed on his purchases of machinery, equipment and electricity used to make them.[8]

Under the New York tax scheme, which is unlike the tax provisions invalidated in *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue*, *supra*, and *Arkansas Writers' Project, Inc. v Ragland*, *supra*, it is within the power of the newspaper publisher to operate the business to qualify for the exemption without changing the nature of the pub-

[8]The reason pennysavers are not generally sold is because their production is not the same kind of business as the publication of a "newspaper", in the conventional sense of the word. Producers of pennysavers, like petitioner, primarily operate an advertising service, as the New York courts found, and as petitioner readily admitted in the joint stipulation (A9). The distribution of the papers circulates the advertisements.

lication. If a publisher chooses to sell the papers—even for a nominal fee—it may have the exemption on its purchases. This is true no matter whether the newspaper is large or small, or regardless of what is written in it. The sales tax falls on all businesses, not just on the press; and all businesses get an exemption the same way. For example, if a lumber company purchases special machinery to imprint small boards as rulers advertising the lumber company and those rulers are given away as promotionals, it must pay the sales tax on the purchase of the machinery.

This scheme, which focuses on retail sales, is widely used by most States and is directly related to the goal of the imposition of sales taxes. Because of its general applicability to all businesses alike it cannot be said to be either content based or aimed at the press or any segment of the press. There is thus no danger that the effect of the scheme would stifle the free expression of particular ideas.

The Statutory Scheme Does Not Differentiate Among Members Of One Segment of the Press

Petitioner's claim is based on his fallacious assumption that New York in its interpretation of the word "sale" in the statute effectively discriminates among members of one segment of the press. As the New York courts correctly and unanimously concluded, and as explained above, the statutory scheme focuses on the method of doing business, so that the tax falls on the last transaction in a chain of sales. It does not consider the nature of the business itself.

If some newspapers qualify for an exemption for certain purchases that does not make the imposition of tax on others unconstitutional. As this Court said in *Leathers v Medlock*,

supra, 499 US at 452-453, a tax scheme that effects a differential burden on speakers is insufficient by itself to raise First Amendment concerns - even if among different members of the press - unless the tax is directed at or presents the danger of suppressing particular ideas. This is particularly true when a tax effects a "penalty for a few." *Leathers v Medlock*, *supra*, 499 US at 447-448, citing *Minneapolis Star*, *supra*, 460 US at 592, and *Arkansas Writers' Project*, *supra*, 481 US at 229 and n 4. It is clear from New York's taxing structure that purchases of all things not resold (not just free circulation newspapers) are subject to tax. Since all pennysavers are given away (along with other kinds of free newspapers), they are all taxed equally. Thus, there is no "penalty for a few."

The Exemption Is Not Based On Content

Petitioner attempts to thrust all free circulation newspapers into one class regarding content and then argues that a failure to exempt them is discrimination based on that content. Even if all such papers suffer equally without an exemption it is unreasonable to assume that every pennysaver in New York State is similar in content. The free circulation publications described by petitioner (Pet, p 17) report community events and opinions about local matters which may run the gamut of varying points of view and include a multitude of subjects. This is unlike the statute in *Arkansas Writers' Project*, *supra*, which taxed general interest magazines while exempting religious, professional, trade and sports journals. The applicability of an exemption under that Arkansas statute turned on the subject matter (as distinguished from viewpoint) of the publication. Under the New York scheme the topics covered by a publication have no tax consequences whatever. Moreover, petitioner contradicts

himself when he claims that the tax scheme that differentiates between paid and free circulation newspapers leaves competitors on uneven ground (Pet, p 16). As he himself reports a few sentences later (p 17), the papers occupy separate spheres and are not competitors.[9]

Petitioner also has no basis for his claim that the Court of Appeals decision holds a broad danger to the suppression of political speech. He notes that the taxing structure and interpretation of the word "sale" in New York means that the purchase of machinery, equipment, or electrical services used to produce political handbills is not exempt either. Such taxation is simply an application of the generally applicable taxing provisions. The tax applies evenly to all production facilities, including those that happen to produce political handbills, regardless of the point of view, because they are given away rather than sold.

There Is No Equal Protection Issue

Tax statutes, by their nature, draw lines and make distinctions. It has been said by this Court time and time again that legislatures have "especially broad latitude" in this area. *Leathers, supra*, 499 US at 451, citing *Regan v Taxation With Representation of Washington*, 461 US 540, 547 (1983); *Nordlinger v Hahn*, ____ US ____, 120 L Ed 2d 1, 13, 112 S Ct 2326, 2332, (June 18, 1992); *Exxon Corporation v Eagerton*, 462 US 176, 196 (1983); *see also, Minneapolis Star, supra*, 460 US at 599, Rehnquist, CJ, citing *Allied Stores of Ohio, Inc. v Bowers*, 358 US 522, 526-527 (1959).

[9]See note 8, p 10.

Since it is not the judicial function to second-guess the policy decisions the legislatures make, a classification in a statute that neither involves fundamental rights nor proceeds along suspect lines carries a strong presumption of validity and will be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Heller v Doe*, ____ US ____, 125 L Ed 2d 257, 270, 113 S Ct 2637, 2642 (June 24, 1993); *Nordlinger v Hahn*, *supra*; *Exxon Corporation v Eagerton*, *supra*. The Equal Protection Clause protects only against invidious discrimination. *Federal Communications Commission v Beach Communications, Inc.*, ____ US ____, 124 L Ed 2d 211, 223, 113 S Ct 2096, 2102-3 (1993).

In this case, all businesses like petitioner's are treated equally by the statutory scheme. Although the tax consequences for the publishers of paid circulation newspapers are different, so is the nature of their business and product of that business. The only taxing classification made here - between purchases used to produce tangible personal property for sale and those not for sale - stands solidly on a rational base. (As described above, tax is imposed once, at the time of the final retail sale). Therefore, petitioner cannot complain of a more invidious classification based on the nature of the publication or discrimination among members of one segment of the press, and as described above, neither can he argue that the tax classification affects his First Amendment rights. Consequently, he cannot make a meritorious claim under the Equal Protection Clause.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
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Respectfully submitted,

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